Petition

81-1676

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NO.

In the Supreme Court of the United States

January Term, 1982

(11th Circuit Case No. 80-5735)

ANDY JERGUSON, et al.,
Petitioner,

vs.

BLUE DOT INVESTMENT, INC.
a Panamanian corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH DISTRICT

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QUESTIONS PRESENTED

Whether, for diversity jurisdiction purposes under 28 U.S.C.A. 1332(c), a foreign corporation is deemed to be a citizen of the state where it has its principle place of business within the United States in the same manner as a domestic corporation or whether the reference to corporations in 28 U.S.C.A. 1332(c) is only to domestic corporations.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

TO: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Andy Jerguson, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Eleventh Judicial Circuit (Former Fifth) entered in the above entitled case on October 13, 1981, rehearing denied on January 11, 1982.

OPINIONS BELOW

The Opinion of the Eleventh Judicial Circuit is reported at 659 F.2d 31 (11th Cir. 1982), and is printed in Appendix A hereto, *infra*, page 1. The judgment of the United States District Court for the Southern District of Florida is printed in Appendix A hereto, *infra*, page 13.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit (Former Fifth) (Appendix A) was entered on October 13, 1981. A timely petition for rehearing was denied on January 15, 1982. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Sec. 1254(1) and Art. III, Sec. 2, cl. 1, U.S. Const.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of 28 U.S.C. 1332(c)(d) which provides as follows:

> "For the purposes of this section and section 1441 of this Title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."
>
> "(d) The word "States" as used in this section, includes the territories, the District of Columbia and the Commonwealth of Puerto Rico."

The constitutional questions involved arise under U.S. Const. Amend. 14, Sec. 1. Citizens of United States, which reads:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are Citizens of the United States and of the State wherein they reside."

The case also involves Art. III, Sec. 2, cl. 1—*Jurisdiction of* Courts, which reads:

> "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the

United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State;—between Citizens[1] of different States; —between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[1]Petitioner contends, in part, that "Citizens of different States" must be read in conjunction with ". . . between a State, or the Citizens thereof, and foreign States, Citizens or subjects."

STATEMENT OF THE CASE

This is a case of first impression involving a question of law which has been interpreted in conflicting ways by several districts and which had not heretofore been treated by any of the Circuit Courts of Appeal, other than by footnote.

The Petitioner, Andy Jerguson, Plaintiff below, sued Respondent, Blue Dot Investment, Inc., a corporation chartered in the Republic of Panama, but doing business in Dade County, Florida, in a class action seeking certain relief against the Panamanian corporation as a result of intrusion upon the Plaintiffs' rights caused by the actions of the Panamanian corporation.

The Plaintiff and all others similarly situated are all residents of Dade County, Florida in the Southern District of Florida. The Panamanian corporation was chartered in Panama and is thus considered to be a "citizen" of the Republic of Panama.

Suit was brought against the Panamanian corporation in the United States District Court for the Southern District of Florida by Plaintiffs, alleging diversity jurisdiction.

Respondent moved to dismiss for lack of jurisdiction, claiming that pursuant to 28 U.S.C. 1332(c)(d) an *alien* corporation must be considered a citizen of *both* the foreign country of its incorporation and of that State within the United States where it has its "principle place of business". Petitioner resisted this interpretation, claiming 28 U.S.C. 1332(c)(d) applied only to domestic corporations.

The District Court, citing conflicting authority on this question among the various other districts, nevertheless *dismissed*, based upon its findings that "since the Defendant's uncontroverted affidavits indicate that Florida is the principle and sole place of business of Blue Dot . . . even though it is incorporated in Panama, the Court finds the Defendant is a Florida citizen."

Since the District Court interpreted 28 U.S.C. 1332(c)(d), to include *foreign* chartered corporations such as Respondent and thereby made them citizens of the United States for diversity purposes, the District Court found that diversity was lacking between Plaintiffs and Defendant and the Court was without jurisdiction to entertain the case.

Upon dismissal for lack of diversity jurisdiction, Petitioners appealed to the (then) Fifth Circuit.

THE RULINGS BELOW

The Court of Appeals determined the legal issue to be:

> ". . . whether, for diversity jurisdiction purposes under 28 U.S.C.A. Sec.1332(c), a foreign corporation is deemed to be a citizen of the State where it has its principle place of business . . . (within the United States).

The Court in its opinion, discussed several of the decisions of the various districts, recognizing that the district courts were split on the question and, after discussion, determined and held that:

> ". . . a foreign corporation is a citizen for diversity jurisdiction purposes of a state where it has its principle place of business."

in doing so, the Fifth Circuit rejected a line of cases arising in the Southern District of New York which reached the opposite conclusion. *Eisenberg vs. Commercial Union Assurance Co.*, 189 F.Supp. 500 (S.D. N.Y. 1960); *Tsakonites vs. Trans Pacific Carriers Corp.*, 246 F.Supp. 634 (S.D. N.Y. 1965); *Chemical Transportation Corp. vs. Metropolitan Petroleum Corp.*, 244 F.Supp. 563 (S.D. N.Y. 1964); *Mazzela vs. Pan Oceanica A/S Panama*, 232 F.Supp. 29 (S.D. N.Y. 1964). The Court also disregarded *dicta* in a Second Circuit Opinion which, by footnote, stated that alien corporations organized under the laws of another country were probably deemed to be citizens exclusively of their country of organization. *Clarkson Co., Ltd. vs. Shaheen*, 544 F.2d 624, 627-28, n. 5 (2nd Cir. 1976).

The Fifth Circuit opted instead to follow *Southeast Guaranty Trust Company, Ltd. vs. Rodman and Renshaw, Inc.*, 358 F.Supp. 1001 (N.D. Ill. 1973) and *Richmond Construction Corp. vs. Hilb*, 482 F.Supp. 1201 (M.D. Fla. 1980), which rejected the line of cases in the Southern District of New York and the dicta in *Clarkson Co., Ltd. vs. Shaheen, supra.*

The Fifth Circuit based its reasoning upon its' understanding of the intent of Congress to limit diversity jurisdiction in the 1958 Amendment to 28 U.S.C. 1332(c). Petitioner, respectfully, disagrees with the decision of the learned Eleventh Circuit panel.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve conflicts in the law among the various districts. This case is apparently one of first impression which has been addressed only by two circuit courts, the Second Circuit (by footnote) and the former Fifth, now Eleventh Circuit.

In a footnote, the *Second* Circuit indicated a completely opposite view of the later holding by the *Fifth* Circuit.

The District Courts are in obvious conflict on this question and, with the utmost deference to the former Fifth Circuit opinion, it would appear that treating foreign chartered corporations as citizens of states within the United States, in which the foreign chartered corporations have their principle place of business, would tend to *expand diversity* jurisdiction of the federal courts, rather than limit jurisdiction.

Restricting jurisdiction in cases and controversies between Citizens of a State of the United States and a Citizen of a foreign State also offends Art. III, Sec. 2, cl. 1 of the United States Constitution which clearly vests jurisdiction in the federal Courts of such cases by its clear, precise language.

JURISDICTIONAL EXPANSION

Federal Diversity jurisdiction is necessarily *expanded* by the interpretation given to 28 U.S.C. 1332(c) by the former Fifth Circuit.

Under the reasoning of the former Fifth, a Panamanian or other foreign corporation is now deemed to be a citizen of *both* the foreign state by which it has been incorporated and of the state where it has its principle place of business within the United States. Thus, for diversity purposes, the former Fifth Circuit has conferred *dual* citizenship on many foreign corporations. In accordance with the former Fifth Circuit's reasoning, a foreign corporation is both a citizen of the foreign state where it is incorporated, and is also a citizen of that State *within the United States* where the foreign corporation has its principle place of business.[2]

One of the results of such an interpretation of 28 U.S.C. 1332(c), is to expand diversity jurisdiction to permit a corporation falling in this category to institute suit in a United States District Court, within the American

[2]Apparently, the size or extent of the foreign corporation's business activities "within the United States" is of no consequence. Thus any degree of business in the United States would suffice if it was the sole United States activity.

State where it has its principle place of business, against a citizen of a foreign state, as well as against citizens of other American States.

Prior to the decision of the former Fifth Circuit, no such jurisdiction existed. *ITT vs. Ventron, etc.*, 519 F.2d 1001, 1015 (2nd Cir. 1975).

Under the interpretation followed by *Eisenberg vs. Commercial Union Assurance Company, supra*, and the line of cases following Eisenberg, diversity would *not* be expanded.

If the decision of the former Fifth Circuit were to stand, extreme conflict would be created not only among the circuits, but as to interpretations of the other code sections which *deny access* to the United States District Courts when the Plaintiff and Defendant are both alien corporations. *ITT vs. Ventron, etc., supra.*

CONGRESSIONAL INTENT

Congress intended 28 U.S.C. 1332(c) to apply only to domestic corporations.

In 1958, Congress amended 28 U.S.C. 1332(c), et seq. However, and significantly, Congress made no change in Subsection (d) of the Code which defined the word States as follows:

> "The word States, as used in this Section includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."

Significantly, Congress did not include foreign countries in its definition of the word States. Nor would

(d) be necessary under the reasoning of the decision below. Section (d) would be superfluous.

Additionally, when the term "foreign states" is used in Section 1332, it is used in the *lower case*, designating a foreign government.

On the contrary, whenever it referred to one of the *several States of the United States*, Congress used the *upper case* designation. *Eisenberg vs. Commercial Union Insurance Co., supra.*

A search of the various code sections of the United States indicates that virtually all of the definitions of the term "State", used with a capital S, conclusively determines that the term "State" refers to one of the several *American* States. See: e.g. 15 U.S.C. 1701(a).

> "State" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the Territories and possessions of the United States.

The revised Bankruptcy Act, approved November 6, 1978, 11 U.S.C. 101(21) states:

> "Governmental Unit" means United States; State; Commonwealth; Territories; Municipality; foreign states; a State, a Commonwealth, a District, a Territory, a Municipality or a foreign state or other foreign or domestic governments."

As a result of the wide dispairity, reasoning and interpretation of 28 U.S.C. 1332(c), by the various districts and now the 2nd and 11th Circuits, this Court should grant jurisdiction to determine the jurisdictional

parameters of the United States District Courts pursuant to 28 U.S.C. 1332(c).

POLICY CONSIDERATION SHOULD PERMIT AMERICAN CITIZENS TO SUE FOREIGN CORPORATIONS IN THE FEDERAL COURTS

The definition and recognition of foreign states by this country changes from time to time. This is because recognition of a foreign sovereignty is a political and not a judicial matter, and the federal courts are conclusively bound by the status accorded a sovereignty by the Executive Branch of our government from time to time. *Klausner vs. Levy*, 83 F.Supp. 599 (D.C. Va. 1949).

Although briefed below, the Fifth Circuit does not discuss this aspect of its ruling in its' opinion.

This aspect is important because a foreign corporation, in accordance with the former Fifth Circuit's opinion, is considered *both* a citizen of its country of incorporation *and* a citizen of the state within the United States where that corporation has its principle place of business.

Thus, if a Cuban corporation had its principle place of business within the United States by virtue of having its *only* place of business in the Southern District of Florida, it would still be recognized as a Florida citizen for diversity purposes, regardless of the United States' recognition or non-recognition of Cuba. Surely this was not the intention of the Congress in drafting Section 1332(c). On the other hand, the Executive Branch cannot

withdraw recognition of one of the several American States.

The former Fifth Circuit may have inadvertantly overlooked the definition given the term "States" by the Congressional Committee considering the changes to be made in 28 U.S.C. 1332(c). The Committee specifically utilized the definition of the term "States" as, "States of the Union". See: *pp. 3116 Sen. Rep. 1830; 1958 U.S. Code. Cong. Adm. News, p. 3099, 3116.*

A reading of the Congressional Reports indicate conclusively that the term "State", referred only to States of the Union and *not* to foreign states:

> "The States however, as members of the Union, are denied the power of independent nations to pursue justice on behalf of their citizens through diplomatic channels against citizens of other states; and in lieu of this, the Constitution provides Courts of the Federal Government, the Government of all the people of the country, to administer justice in cases where citizens of different states are involved, so that neither party may be required to seek justice from the state of his adversary."

It would appear that the former Fifth, in understandable concern of the increasing Federal case load, has attempted to close one jurisdictional avenue to the federal courts, but by doing so has inadvertantly opened a vastly wider jurisdictional avenue and, in the process has inadvertantly applied erroneous legal principles by interpreting the parameters of 28 U.S.C. 1332(c) to deny your Petitioner access to the federal courts.

It is respectfully submitted that the very learned Justices on the former Fifth, now Eleventh Circuit, inadvertantly erred in declining to accept the prior rationale expressed by the Second Circuit by dicta and the majority view of those District Courts which have considered the question.

As a result of the decision below, serious conflict has been created and petitioners have been denied access to the District Court to assert their claims against a foreign corporation.

ART. III, SEC. 2, CL. 1 IS IN CONFLICT WITH THE INTERPRETATION GIVEN TO 28 U.S.C. 1332(c) BY THE ELEVENTH (FORMER FIFTH) CIRCUIT

Our Constitution vests jurisdiction in the District Courts for cases and controversies between . . . a State, or the Citizens thereof, and foreign states, Citizens or Subjects. Such jurisdiction *is in addition to* the jurisdiction over cases and controversies between . . . Citizens of different States . . . the two jurisdictional grants are *separate* and *distinct*.

The former Fifth's opinion blurs and, in fact eradicates, the clear jurisdictional grant of diversity given by Art. III, Sec. 2, cl. 1, as to controversies between Citizens of a State and Citizens or Subjects of a foreign state.

In the face of such clear conflict between the Constitutional vesting of jurisdiction for such actions and statutory construction which must necessarily do violence with the clear language of the Constitution,

the Statute must be construed in a manner not to conflict with the Constitutional grant of jurisdiction.

Questions of Congressional intent or the filing of too many cases in the federal courts are simply immaterial when a Constitutional mandate is exercised. An American Citizen is given the choice of forum by the Constitution in cases and controversies where the American Citizen sues a Citizen or Subject of a foreign state. The choice is *not* given to the foreign Citizen. The exercise of a constitutional right by petitioner is not an "abuse of diversity jurisdiction."

Respectfully, the learned former Fifth Circuit panel misconstrued the clear language and intent of Art. III, Sec. 2, cl. 1, U.S. Const. in its opinion below in denying petitioner access to a federal forum.

CONCLUSION

Wherefore, Petitioners respectfully pray that a Writ of Certiorari be granted to resolve the conflicts created by the decision below and their denial of access to the District Court be reversed.

Respectfully submitted:

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CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed this 2 day of March, 1982 to Bruce J. Berman, Esq., Myers, Kaplan, et al., 1428 Brickell Avenue, Miami, Florida 33131.

By: Jos. S. Paglino
Joseph S. Paglino, Esq.

Appendix

Andy JERGUSON, individually and on behalf of all others similarily situated, et al.,
Plaintiffs-Appellants,

v.

BLUE DOT INVESTMENT, INC., a Panamanian corporation,
Defendant-Appellee.

No. 80-5735.

United States Court of Appeals,
Fifth Circuit.*
Unit B
Oct. 13, 1981.

Florida citizens brought action against Panamanian corporation asserting legal and equitable interest in golf course purchased by defendant for development. The United States District Court for the Southern District of Florida, Sidney M. Aronovitz, J., dismissed the action for lack of jurisdiction, and plaintiffs appealed. The Court of Appeals, Roney, Circuit Judge, held that since defendant's principal place of business was in Florida, it was deemed to be a Florida citizen for diversity purposes, thereby destroying diversity of citizenship between defendant and plaintiffs.

Affirmed.

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

1. Federal Courts —300

A foreign corporation is a citizen for diversity jurisdiction purposes of state where it has its principal place of business. 28 U.S.C.A §1332(c).

2. Federal Courts —611

Issues raised for first time on appeal are generally not considered by the Court of Appeals.

3. Federal Courts —300

Panamanian corporation, with its principal place of business in Florida, was a Florida citizen for diversity purposes, thereby destroying diversity of citizenship between it and Florida plaintiffs. 28 U.S.C.A. §1332(c).

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, KRAVITCH and HATCHETT, Circuit Judges.

RONEY, Circuit Judge:

Seeking to play an 18-hole golf course, threatened by a residential development, plaintiff and his foursome never got to drive off the first tee. The starter, in the robe of a district judge, ruled that plaintiff had paid his greens fees at the wrong pro shop. Whereupon plaintiff shouldered his golf bag and headed to this Court for a starting time. Unfortunately for the golfers plaintiff seeks to represent, we agree with the district court

and rule the plaintiff off the course. He does not qualify to compete in tournament in a federal forum. In state court, he can play with a lower handicap.

The legal issue is whether, for diversity jurisdiction purposes under 28 U.S.C.A. §1332(c), a foreign corporation is deemed to be a citizen of the state where it has its principal place of business. The district court ruled the defendant Panamanian corporation, with its principal place of business in Florida, was deemed to be a Florida citizen for diversity purposes, thereby destroying diversity of citizenship between the defendant corporation and the Florida plaintiff. We affirm.

The litigation involves an 18-hole golf course surrounded by a residential community known as North Dade Country Club Village. In October 1979, the developer of the community and owner of the golf course conveyed the golf course to Blue Dot Investment, Inc., a Panamanian corporation, which announced plans to build residences on 9 of the 18 holes. Plaintiff initiated this suit on behalf of himself and all others owning real property in the residential community, asserting legal and equitable interests in the golf course which would be jeopardized by the planned development. Blue Dot moved to dismiss the suit for lack of subject matter jurisdiction and other reasons. Although the complaint predicated jurisdiction both on diversity of citizenship and the existence of a federal question, the district court found no independent federal question and plaintiff has not appealed that portion of the order dismissing the suit.

Plaintiff and the putative class are Florida citizens and defendant is a corporation charterd under the laws of Panama with its principal and only place of business

in Florida. Whether diversity jurisdiction exists therefore depends on whether the governing statute operates to make Blue Dot a citizen of Florida for diversity purposes. 28 U.S.C.A. §1332(c) provides:

> For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . .

This statute does not on its face explicitly apply to foreign corporations or limit its application to domestic corporations. The legislative history is silent regarding its effect on alien corporations. In deciding that "the principal place of business" part of the statute applies to both domestic and foreign corporations, we examine the language of the statute in light of the historical treatment of corporations for purposes of diversity jurisdiction and the specific congressional purpose in enacting section 1332(c).

Prior to 1958, for diversity purposes, a corporation was deemed to be a citizen only of the state of its incorporation. *See Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 14 L.Ed. 953 (1853). This rule applied to alien corporations, regarded as citizens of their foreign country of incorporation. *Steamship Co. v. Tugman*, 16 Otto 118, 106 U.S. 118, 27 L.Ed. 87 (1882). Determining the citizenship of a corporation for purposes of diversity jurisdiction historically was entagled with the question of whether a corporation, as a mere legal entity, could be considered a citizen at all. For a detailed discussion of the early Supreme Court cases in this

area, see 1 Moore's *Federal Practice* ¶ 0.75[3], at 709.80 *et seq.* (2d ed. 1980).

In 1958, however, Congress adopted subsection (c) of section 1332 as part of legislation designed to reduce the case load of the federal courts and to correct alleged abuses of diversity jurisdiction. By adopting subsection (c), Congress hoped to eradicate a perceived abuse engendered by the citizenship by incorporation rule.

> This fiction of stamping a corporation a citizen of the State of its incorporation has given rise to the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the Federal courts simply because it has obtained a corporate charter from another State. . . . This circumstance can hardly be considered fair because it gives the privilege of a choice of courts to a local corporation simply because it has a charter from another State, an advantage which another local corporation that obtained its charter in the home State does not have.
>
> The underlying purpose of diversity of citizenship legislation . . . is to provide a separate forum for out-of-State citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the Federal courts. Whatever the effectiveness of this rule, it was never intended to extend to local corporations which, because of a legal fiction, are considered citizens of another State. It is a matter of common

> knowledge that such incorporations are primarily initiated to obtain some advantage taxwise in the State of incorporation or to obtain the benefits of the more liberal provisions of the foreign State's corporation laws. Such incorporations are not intended for the prime purpose of doing business in the foreign State. It appears neither fair nor proper for such a corporation to avoid trial in the State where it has its principal place of business by resorting to a legal device not available to the individual citizen.

S.Rep. No. 1830, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. Code Cong. & Ad. News 3099, 3101-02. To correct this alleged abuse Congress provided that for purposes of diversity and removal jurisdiction, corporations can be citizens in two places: the State of incorporation and the State of its principal place of business.

Since the defendant corporation has its principal place of business in Florida, it is deemed a citizen of Florida for jurisdictional purposes if the second part of this statute applies to corporations which have been incorporated in a foreign country.

Only a handful of courts have wrestled with the question of whether section 1332(c) applies to alien corporations and no court of appeals has decided the issue. The district courts are split. A review of those cases presents the arguments on both sides.

In the first reported case to consider the issue, *Eisenberg v. Commercial Union Assurance Co.*, 189

F.Supp. (S.D.N.Y. 1960), a New York citizen sued a British corporation. As in the case at bar, the corporation there argued there was no diversity of citizenship because its principal place of business in the United States was in New York. The court first decided that section 1332(c) applies only to domestic corporations, but then held that even if it does apply to alien corporations it would not bar jurisdiction in that case because the corporation's principal place of business was in London.

In reaching its first holding, the court gave controlling weight to its analysis of the statutory language. Basically, the court held that subsection (c) refers to the same corporation throughout and since the first clause dealing with the place of incorporation can apply only to a domestic corporation, the second clause dealing with its principal place of business necessarily applies only to a domestic corporation.

The court refused to adopt the defendant's argued interpretation of section 1332(c) deeming a corporation to be a citizen "of the State where it has its principal place of business" *within the United States*. Such an interpretation the court said was inconsistent with the intent of Congress to retain diversity jurisdiction in the cases where it was legitimately needed to protect against local prejudice.

> It is a fair inference that a corporation which has located its principal place of business in a State has adopted that State as its actual residence and will not be subject to prejudice against outsiders. If a British corporation has located its principal place of business outside of the United States, however, and has set up

> two branches in the United States, one in Chicago and one in New York, and the one in New York is merely its principal place of business *in the United States*, no inference can be legitimately drawn from those facts that it has adopted New York as its actual residence. Its contact with New York may be so slight that it is still an outsider there. On the other hand, if a Bahaman corporation, for example, has located its principal place of business in New York, the inference is legitimate that it has adopted New York as its actual residence and that it is no longer entitled to be considered an outsider and to deserve the protection accorded outsiders.

Id. at 502.

This *Eisenberg* interpretation has generally been followed in the Southern District of New York. *Tsakonites v. Transpacific Carriers Corp.*, 246 F.Supp. 634 (S.D.N.Y.1965); *Chemical Transportation Corp. v. Metropolitan Petroleum Corp.*, 246 F.Supp. 563 (S.D.N.Y.1964); *Mazzella v. Pan Oceanica A/S Panama*, 232 F.Supp. 29 (S.D.N.Y.1964). *See also Hercules, Inc. v. Dynamic Export Corp.*, 71 F.R.D. 101 (S.D.N.Y.1976); *Union Marine & General Insurance Co. v. American Export Lines, Inc.* 274 F.Supp. 123 (S.D.N.Y.1966); *Willems v. Barclays Bank D.C.O.*, 263 F.Supp. 774 (S.D.N.Y.1966) (holding section 1332(c) does not give dual citizenship to a domestic corporation with its principal place of business in a foreign country). *But see Jerro v. Home Lines, Inc.*, 377 F.Supp. 670 (S.D.N.Y.1974) (holding section 1332(c) applies to alien corporations).

None of these cases went to the court of appeals. The Second Circuit briefly touched on the issue in

dictum in a suit brought by a Canadian trustee in bankruptcy to obtain records in the Canadian bankrupt corporations' New York executive offices. The suit named the New York officers of the corporations as defendants. The court raised the issue of diversity jurisdiction *sua sponte*, noting that under American bankruptcy law the citizenship of the bankrupt rather than the trustee in bankruptcy is determinative for purposes of diversity jurisdiction. The court by footnote stated that as alien corporations organized under the laws of another country, the bankrupt corporations were probably deemed to be citizens exclusively of Canada for diversity purposes, citing cases out of the Southern District of New York and certain treatises. The court disposed of the issue, however, by holding that a trustee, appointed under Canadian law, could use his own citizenship in claiming diversity jurisdiction. *Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624, 627-28, 628 n.5 (2d Cir. 1976).

The leading contrary case holding section 1332(c) applies to alien corporations is *Southeast Guaranty Trust Co., Ltd. v. Rodman & Renshaw, Inc.*, 358 F.Supp. 1001 (N.D.Ill.1973). There, certain of the defendants, domestic corporations with their principal places of business in Illinois, argued there was no diversity of citizenship because the plaintiff, a Bahaman corporation, also had its principal place of business in Illinois. The court rejected the technical analysis of *Eisenberg*, saying there was no ground for concluding that because the first half of section 1332(c) does not apply to alien corporations, the second half cannot. The court concluded that applying the statute to alien corporations would better effectuate the legislative purpose underlying section 1332(c):

> When a corporation, while incorporated in another state, maintained its principal place of business in the same state in which its legal adversary was a citizen, it was felt neither to need nor deserve the protection of a federal court from any possible state court bias against an outsider. This rationale is no less compelling when applied to a corporation which has been chartered in a foreign country but maintains its principal place of business in the United States.

Id. at 1007. This rationale has been followed in the Middle District of Florida, *Richmond Construction Corp. v. Hilb*, 32 F.Supp. 1201 (M.D.Fla.1980), and now in the Southern District of Florida in the instant case.

Although very little has been written in the way of commentary, those who have considered the question have generally concluded on the basis of *Eisenberg* that section 1332(c) probably does not presently apply to an alien corporation but that it should be amended to so apply. *See* 13 Wright, Miller & Cooper, *Federal Practice & Procedure: Jurisdiction* §3628 (1975); 1 Moore's *Federal Practice* ¶¶ 0.75[3]; 0.77[2.-3] (2d ed. 1980); Currie, *The Federal Courts and the American Law Institute*, 36 U.Chi.L. Rev. 1, 37 (1968); Moore and Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 Harv.L.Rev. 426, 1435-36 (1964); Note, 72 Harv.L.Rev. 391, 394 (1958); Note, 6 Utah L.Rev. 231, 239 n.56 (1958). The American Law Institute, in its draft revision of the judicial code, recommended the statute be amended to read: "A corporation shall be deemed a citizen of every State and foreign state by which it has been incorporated

and of the State or foreign state where it has its principal place of business." ALI, *Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft*, §1301(b)(1) (1969).

In arguing against application of section 1332(c) to alien corporations, plaintiff in this case places particular emphasis on the idea that Congress was referring only to American states and did not intend to include foreign countries in the word "State" in providing citizenship in any "State by which it has been incorporated." This is undoubtedly a correct reading of that part of the statute. Subsection (d) defines "States" to include "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico" with no mention of foreign states.

Reading the word "State" to refer only to an American state, however, does not necessitate the conclusion that the principal place of business part of section 1332(c) cannot be applied to alien corporations. We disagree with the analysis in *Eisenberg* that since the first part of section 1332(c) dealing with the place of incorporation necessarily applies only to a business incorporated in the United States, the second part of section 1332(c) dealing with the principal place of business must also be limited to domestic corporations.

It is clear the statute itself does not provide adequate guidance. Nothing in the statutory formula suggests it was to be limited to domestic corporations. The statute refers merely to "a corporation." It can be and has been interpreted in conflicting ways. It does not appear that Congress specifically considered the question of diversity jurisdiction and alien corporations in 1958. It cannot be

inferred from Congress' silence that Congress intended the statute to be construed one way or the other.

[1] Congress was endeavoring to define in which states *in the United States* a corporation would be deemed a citizen for purposes of diversity jurisdiction. Congress intended to limit the diversity jurisdiction of the federal courts to those out-of-state citizens who should be free of local bias. Congress decided there was no need for federal court protection of a corporation with its principal place of business in the same state in which its legal adversary is a citizen, even though it is incorporated elsewhere. Applying section 1332(c) to alien corporations effectuates that congressional purpose. The realities of the situation here support this result. Florida is not just Blue Dot's principal place of business, it is its only place of business. There is no reason to treat it differently from, for example, a Delaware corporation which has its principal place of business in Florida. We therefore hold that a foreign corporation is a citizen for diversity jurisdiction purposes of a state where it has its principal place of business.

[2, 3] Plaintiffs suggest a remand to the district court for an evidentiary hearing as to why Blue Dot was incorporated in Panama. Plaintiffs did not ask for such a hearing in the district court. Issues raised for the first time on appeal are generally not considered by this Court. *In the Matter of Novack*, 639 F.2d 1274 (5th Cir. 1981). In any event, the reasons for Blue Dot's incorporation in Panama are irrelevant. It is undisputed that Blue Dot is an alien corporation with its principal place of business in Florida. That is sufficient for this Court's decision.

AFFIRMED.

[FILED AUG 15 1980]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-679-CIV-SMA

ANDY JERGUSON, etc., et al.,
Plaintiffs,

vs.

BLUE DOT INVESTMENT, INC., etc.,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Defendant has moved to dismiss this class action for lack of subject matter jurisdiction, F.R.C.P. 12(b)(1), and for failure to state a claim upon which relief can be granted, F.R.C.P. 12(b)(6). For the reasons noted below, the Court grants the motion to dismiss for lack of subject matter jurisdiction and therefore does not reach the alternative contentions raised by Defendant.

Plaintiffs allege that they are citizens of Dade County, Florida who own real property at North Dade Country Club Village—a residential community completely encircling an 18-hole golf course. In October, 1979, the developer of the community and owner of the golf course, North Dade Golf, Inc., conveyed the golf course to the Defendant, Blue Dot Investment Inc. Blue Dot subsequently announced plans to plat and construct residences on 9 of the 18 holes of the golf course. Asserting that they have legal and equitable property

interests in the golf course which would be jeopardized by the planned development, Plaintiffs filed this two-count action seeking a declaration of their rights and interests in the golf course and an injunction enjoining Defendant from interfering with those interests.

The jurisdictional predicate for this suit is two-fold: diversity of citizenship, 28 USC Sec. 1332, and federal question 28 USC Sec. 1331. Complaint Par. 1.

Plaintiffs allege, and there is no dispute, that they are citizens of Florida, Complaint Par. 2 and 3, and that Defendant is an alien corporation organized and incorporated under the law of Panama, Complaint Par. 4. Based upon these allegations, Plaintiffs assert that this Court has subject matter jurisdiction over this suit inasmuch as it is an action between "citizens of a State and citizens or subjects of a foreign state." 28 USC Sec. 1332(a)(2). Defendant argues in opposition that, under 28 USC Sec. 1332(c), a corporation is deemed a citizen both of the state by which it has been incorporated and of the state in which it has its principal place of business. Further, Defendant contends that this provision concerning dual corporate citizenship applies to alien as well as domestic corporations. From this premise Defendant argues that since its principal and, in fact, only place of business is Florida, diversity of citizenship between the parties does not exist. Plaintiffs have not contested Defendant's assertion that its principal place of business is Florida; therefore, the only issue before the Court is whether Sec. 1332(c) applies to foreign (alien) corporations.

There is substantial authority refusing to apply Sec. 1332(c) to alien corporations. *See, e.g., Tsakonites*

v. Transpacific Carriers Corp., 246 F.Supp. 634 (S.D.N.Y. 1965); *Chemical Transp. Corp. v. Metropolitan Petroleum Corp.*, 246 F.Supp. 563 (S.D.N.Y. 1965); *Mazzella v. Pan Oceanica A/S Panama*, 232 F.Supp. 29 (S.D.N.Y. 1964); *Eisenberg v. Commercial Union Assurance Co.*, 189 F.Supp. 500 (S.D.N.Y. 1960); *see also Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624 n.5 (2d Cir. 1976) (indicating that alien corporations are "probably deemed to be citizens exclusively of [their home country] for diversity purposes"). However, based upon a review of recent case law representing the "emerging view," *see, e.g., Richmond Const. Corp. v. Hilb*, 482 F.Supp. 1201 (M.D. Fla. 1980); *Corporacion Venezolana de Fomento v. Vintero Sales*, 477 F.Supp. 615 (S.D.N.Y. 1979); *Arab International Bank & Trust Co. v. Westminster Bank, Ltd.*, 463 F.Supp. 1145 (S.D.N.Y. 1979); *Bergen Shipping Co., Ltd., v. Japan Marine Services, Ltd.*, 386 F.Supp. 430 (S.D.N.Y. 1974); *Jerro v. Home Lines, Inc.*, 377 F.Supp. 670 (S.D.N.Y. 1974);l *Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc.*, 358 F.Supp. 1001 (N.D. Ill. 1973), the legislative history of Section 1332, *see* Sen. Rep. No. 1830, 85th Cong., 2d Sess., to accompany H.R. 11102, 2 U.S. Code Cong. & Admin. News 1958, p.3099 et seq., as well as the positions of the American Law Institute, *see Study of the Division of Jurisdiction Between State and Federal Courts*, Official Draft, 1969, Sec. 1301(b)(1), and the commentators, *see* 1 Moore's Federal Practice Par. 0.75[3] (1972); 13 Wright, Miller & Cooper, Federal Practice & Procedure Sec. 3628 (1975), this Court is persuaded that the better rule is to apply Sec. 1332(c) to alien corporations whose principal place of business is located in the United States. Thus, since Defendant's uncontroverted affidavits indicate that Florida is the principal and sole place of business of Blue Dot, *see* D#6, even though it is incorporated in Panama, the

Court finds Defendant is a Florida citizen. Lacking complete diversity between Plaintiffs and Defendant, this Court cannot further consider this suit insofar as it is predicated on diversity jurisdiction. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806).

As indicated, the alternative basis for jurisdiction is 28 USC Sec. 1331 which, in pertinent part, provides that "[t]he district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws or treaties of the United States. . . ." An examination of the Complaint here reveals the only "federal question" Plaintiffs raise is their assertion in count 2 that Metropolitan Dade County, Florida's approval of Blue Dot's development plans without a public hearing or other administrative remedy is a deprivation of their "property rights without due process of law in violation . . . of the 14th Amendment." Complaint Par. 24 and 25. As Plaintiffs do not cite the Court to any other federal statute or provision of the federal constitution, we must assume, first, that Plaintiffs seek to sue Defendant directly under the 14th Amendment and, secondly, that Plaintiffs assert such a direct cause of action under the 14th Amendment as being sufficient, standing alone, to provide a basis for invoking jurisdiction under Sec. 1331. The law in this Circuit is now established that no such direct cause of action is implied under the 14th Amendment and, therefore, is no basis for federal jurisdiction. *Hearth, Inc. v. Department of Public Welfare*, 612 F.2d 981 (5th Cir. 1980); *see also Turpin v. Mailet*, 591 F.2d 426 (2d Cir. 1979).

In view of the foregoing, the Court holds that the instant complaint is fatally defective in that it fails to

instant complaint is fatally defective in that it fails to state an adequate basis for jurisdiction under either 28 USC Sec. 1331 or 1332. It is therefore

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is GRANTED and Plaintiffs' Complaint is, accordingly, DISMISSED without prejudice to a determination of Plantiffs' rights, if any, in an appropriate state forum.

IT IS FURTHER ORDERED AND ADJUDGED that the Court's previous Discharge of the Notice of Lis Pendens filed by Plaintiffs is hereby affirmed*; however, the Stipulation as to Security on Discharge of Lis Pendens** is vacated and any funds deposited by Defendant in escrow shall be returned with accrued interest to Defendant within fifteen (15) days herefrom.

DONE AND ORDERED in Chambers at Miami, Florida this 15 day of August, 1980.

/s/ JOSE A. GONZALES
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Joseph S. Paglino, Esq.
Bruce J. Berman, Esq.

*See Docket No. 20.

**See Docket No. 21.

Opposition

Supreme Court, U.S.
FILED
APR 5 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1676

In the Supreme Court of the United States

January Term, 1982

ANDY JERGUSON, et al.,

Petitioners,

vs.

BLUE DOT INVESTMENT, INC.,
a Panamanian corporation,

Respondent.

On A Petition for Writ of Certiorari
To the United States Circuit Court of Appeals
for the Eleventh Circuit

BRIEF FOR RESPONDENT BLUE DOT INVESTMENT, INC. IN OPPOSITION

BRUCE J. BERMAN
MYERS, KAPLAN, LEVINSON,
KENIN & RICHARDS

Counsel for Respondent
1428 Brickell Avenue, Suite 700
Miami, Florida 33131
Telephone: (305) 371-9041

QUESTION PRESENTED

Whether the federal courts have subject matter jurisdiction under the federal diversity statute, 28 U.S.C. §1332, of a dispute involving the use of a Miami golf course, between local Miami property holders (Petitioners) and a corporation (Respondent) whose only offices and property (the golf course) are also located in Miami, merely because the corporate defendant has obtained its charter from the Republic of Panama.

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The opinion of the circuit court of appeals (Pet. App. A-1 to A-12)[1] is reported at 659 F.2d 31.

[1]All references to "Pet. App." are to the Appendix to the Petition for Writ of Certiorari dated March 2, 1982.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 1981; petition for rehearing was denied by order dated December 30, 1981; and the petition for certiorari was filed on or about March 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and further purports to be invoked under Art. III, Sec. 2, c1.1 of the United States Constitution.

STATEMENT

Petitioners, as Plaintiffs below, asserted claims against the Respondent in the U.S. District Court for the Southern District of Florida premised upon diversity jurisdiction.

It has never been contested that Petitioners are citizens of the State of Florida. Nor has it been contested that Respondent corporation, although registered in the Republic of Panama, has its *only* place of business in the world and its only property and assets in Miami, Florida. Respondent is a purely local operation, doing business in no other state, country, republic, possession or territory in the world. In short, suit was brought by Florida citizens against a local Florida business entity which fortuitously had elected to incorporate in Panama.

Against this undisputed factual background, U.S. District Judge Sidney M. Aronovitz dismissed the complaint for lack of diversity jurisdiction (Pet. App.

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Against this undisputed factual background, U.S. District Judge Sidney M. Aronovitz dismissed the complaint for lack of diversity jurisdiction (Pet. App.

A-13 to A-17),[2] holding that Respondent was, for diversity purposes, a citizen of the State of Florida.

In a thorough decision reviewing at length the applicable legislative history, case law and positions of the commentators, the court of appeals unanimously affirmed the district court's dismissal (Pet. App. A-1 to A-12), interpreting the dual citizenship provision of Section 1332(c) to evince the following intent:

> "Congress intended to limit the diversity jurisdiction of the federal courts to those out-of-state citizens who should be free of local bias. Congress decided there was no need for federal court protection of a corporation with the principal place of business in the same state in which its legal adversary is a citizen, even though it is incorporated elsewhere."
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> Pet. App. A-12.

The court of appeals further noted that where Respondent's *only* place of business was in the State of Florida, there simply was no reason to treat it differently from any other local corporation incorporated outside of the state.

It is this determination of which Petitioner here seeks review.

---

[2]Petitioner mistakenly inserted the wrong name on the signature line of the conformed Order at Pet. App. A-17; in fact, the original order was signed by Judge Aronovitz (See Pet. App. A-1).

ARGUMENT

As conceded in the Petition, the question presented has never been decided by an appellate court in the federal system except in this action (Pet., p. 1). Accordingly, there is no conflict with the decision of another federal court of appeals on the same matter to warrant this Court's exercise of judicial discretion to consider the issue under the standards set forth in Rule 17.1 of the Rules of this Court.[3] Nor is there any other applicable standard under Rule 17.1 upon which to premise the issuance of the writ in this matter.

On the merits, the circuit court's interpretation of Section 1332(c) has substantial support in the case law[4].

---

[3]Petitioner's assertion at p. 4 of the Petition that a conflict exists between the decision below and the decision of the Second Circuit Court of Appeals in *Clarkson Co., Ltd. v. Shaheen*, 544 F.2d 624 (2d Cir. 1976), is demonstrably erroneous. As the court noted below (Pet. App. A-9), and as the Second Circuit made eminently clear, the issue was never reached by the Second Circuit, and thus there is, in fact, no conflict. The diversity issue reached by the Second Circuit was decided on the basis of citizenship of a trustee in bankruptcy appointed under the law of Canada. The citizenship of the bankrupt, a Canadian corporation with executive offices in New York, was *not* determined by the court.

[4]See, *e.g.*, *Southwest Guaranty Trust Company, Ltd. v. Rodman & Renshaw, Inc.*, 358 F.Supp. 1001, 1007 (N.D.Ill. 1973) (Will, D.J.) (holding that a Bahamian corporation with its principal place of business in Illinois is a citizen of Illinois for diversity purposes); *Arab International Bank & Trust Co., Ltd. v. National Westminster Bank Limited*, 463 F.Supp. 1145, 1147 (S.D.N.Y. 1979) (Sand, D.J.); *Bergen Shipping Co., Ltd. v. Japan Marine Services, Ltd.*, 386 F.Supp. 430, 431-434 (S.D.N.Y. 1974) (Conner, D.J.); *Jerro v. Home Lines, Inc.*, 377 F.Supp. 670, 672 (S.D.N.Y. 1974) (Gurfein, D.J., later U.S. Cir. Judge, 2nd Cir.); *Richmond Const. Co. v. Hilb*, 482

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court of its creation jurisdiction of any of the enumerated controversies." *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). See also *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

In short, Petitioners' latest arguments notwithstanding, the issue comes down solely to statutory interpretation. The interpretation of the circuit court below, *not* in conflict with any other circuit court ruling, is both reasonable and persuasive, and is amply supported. Based upon this Court's own standards, it is not presently ripe for review.

CONCLUSION

The Petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

MYERS, KAPLAN, LEVINSON, KENIN & RICHARDS
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Miami, Florida 33131
Telephone: (305) 371-9041

By_____
BRUCE J. BERMAN

CERTIFICATION

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed by depositing the same in a United States mail box, with first-class postage prepaid, addressed to Joseph S. Paglino, counsel for Petitioners, 88 N.E. 79 Street, Miami, Florida 33138, this 2 day of April, 1982.

By_____
BRUCE J. BERMAN